APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED MAY 5, 2004

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 02-2305

LIONEL LUGO RODRIGUEZ, ET AL.,

Plaintiffs, Appellants,

v.

PUERTO RICO INSTITUTE OF CULTURE, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Jay A. Garcia-Gregory, *U.S. District Judge*]

Before

Selya, Circuit Judge,
Coffin, Senior Circuit Judge,
and Lipez, Circuit Judge.

COFFIN, Senior Circuit Judge. For more than a decade, appellant Lionel Lugo Rodríguez has been pursuing an endorsement from the Puerto Rico Institute of Culture ("PRIC") for his shopping mall project in an historic district of San Germán, Puerto Rico. Such an endorsement is a prerequisite for the project to be classified as tax-exempt, and Commonwealth administrative and judicial proceedings concluded with denial of the

endorsement. Appellant argues here that the process leading to that result was tainted by fraud, and he seeks a remedy under federal RICO and civil rights law, as well as under Puerto Rico tort provisions. We agree with the district court that appellant already has had his day in court on this matter and that further deliberation on the particulars is barred by the doctrine of res judicata. We decline to add another lengthy chapter to the saga and therefore provide background only as necessary to explain our conclusion.

The merits of appellant's claim that PRIC wrongfully denied him its endorsement were thoroughly considered by the Puerto Rico Circuit Court of Appeals, which reviewed the voluminous correspondence and other documentary evidence generated between 1988 and 1998, as well as the administrative transcript, and concluded that appellant "did not fulfill his obligation to show any irregularity in the proceedings." Rather, the court determined that the PRIC endorsement was denied because appellant failed to satisfy the architectural requirements that the agency had specified. Appellant claims that newly discovered evidence of fraud entitles him to revisit this judgment. Appellees respond with multiple bases for dismissing the federal claims, including appellant's alleged failure to adequately plead a RICO cause of action, Eleventh Amendment immunity, and the *Rooker-Feldman* doctrine. With an exception we address below, *see infra* at note 2, we believe that the most direct path—and thus the most appropriate—is via preclusion principles.

Res judicata under Puerto Rico law precludes "only claims that were or could have been raised in a previous suit," *Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 62 (1st Cir.2000), and there must be " 'the most perfect identity between the things, causes, and persons of the litigants,

and their capacity as such,' " *id.* at 61 (quoting P.R. Laws Ann. tit. 31, § 3343). The resemblance between the cases need not literally be "perfect," however. *Id.* "For res judicata purposes, '[t]he thing corresponds basically to the object or matter over which the action is exercised.' " *Id.* (quoting *Lausell Marxuach v. Díaz De Yáñez*, 3 P.R. Offic. Trans. __, slip op. at 7 (1993)). The "cause" refers to "the main ground or origin of the action." *Id.; see also Worldwide Food Distributors, Inc. v. Alberic Colón Bermúdez*, 133 D.P.R. 827, 33 P.R. Offic. Trans. ––, slip op. at 7, 1993 WL 840035 (1993) (" 'the cause is equivalent to a ground or reason for asking' ") (citation omitted). Preclusive effect is given only to judgments that are "final and unappealable." *Boateng*, 210 F.3d at 63.

We conclude that the prerequisites for application of res judicata are met here. Unquestionably, the underlying issue—the legitimacy of PRIC's refusal to grant appellant an endorsement for a tax exemption—is identical, matching both "thing" (the endorsement) and "cause" (the validity of its denial). The commonwealth circuit court decision on which we rely became final when the Puerto Rico Supreme Court denied certiorari in March 1999.[1] The parties, in pertinent respects, are the same.[2]

1. Shortly before he filed this federal action, appellant filed a second commonwealth lawsuit against PRIC raising claims stemming from the denial of the tax exemption. The Puerto Rico Court of First Instance dismissed that complaint with prejudice, and his petition for review remains pending in the Puerto Rico Supreme Court. It is appellant's earlier commonwealth action, however, that provides the basis for our res judicata holding. It appears that appellant also filed a separate commonwealth action against the Municipal Revenue Collection Center (CRIM), another defendant in this case, and that the CRIM action remains pending as well.

2. We note that the original commonwealth action involved only appellant and PRIC. Although the federal lawsuit named additional plaintiffs and defendants, the district court supportably determined that

(Cont'd)

Appellant nonetheless maintains that the commonwealth judgment may not be given res judicata effect because it was infected by fraud, and the presence of fraud triggers an exception to the doctrine of res judicata. *See, e.g., Medina v. Chase Manhattan Bank, N.A.*, 737 F.2d 140, 144 (1st Cir.1984).[3] Moreover, he contends that the new allegations of fraud that underlie his RICO and civil rights claims distinguish this case from the earlier litigation and could not have been raised earlier—making res judicata by definition inapplicable.

(Cont'd)
most of the new parties (appellant's business entities, individual PRIC officials and PRIC's insurer) held the same interests as the original parties, so res judicata applies as well to the claims against them. *See Perez-Guzman v. Gracia*, 346 F.3d 229, 233-38 (1st Cir.2003); *Paniagua v. Corporacion de Fomento Recreativo*, 986 F.Supp. 694, 697 (D.P.R.1997) (citing *Acevedo Santiago v. Western Digital Caribe, Inc.*, 140 D.P.R. 452, 40 P.R. Off. Trans. __ (1996)).

The one possible exception is CRIM (along with several CRIM employees), but the claims against CRIM were properly dismissed for other reasons. Appellant acknowledges that the Butler Act, 48 U.S.C. § 872, prohibits a federal court from barring CRIM's collection of the disputed taxes on his project. He makes an additional due process claim, undeveloped in his brief, based on the revocation of a fifteen-year tax exemption apparently granted to the property before he owned it. We decline to delve below the murky surface of this allegation, but note that the challenged reassessment occurred no later than 1998; any resulting constitutional claim would have been subject to a one-year statute of limitations. *See Ruiz-Sulsona v. Univ. of Puerto Rico*, 334 F.3d 157, 159 (1st Cir.2003). His assertion that he did not discover the reassessment until 2001 is belied by his statement that he learned of the alleged retroactive debt in 1998 when he went to the Puerto Rico Tourism Company to apply for an extension of the tax exemption. *See, e.g.*, Reply to Order to Show Cause and Motion for Reconsideration; Affirmation in Support to Supplemental Opposition to Motion to Dismiss.

3. At oral argument, appellant's counsel made passing reference as well to the public policy exception to res judicata, *see Medina*, 737 F.2d at 144. The point was not developed, however, and in these circumstances, we fail to see how it would provide an independent basis for avoiding the doctrine.

Appendix A

As best we can tell, the centerpiece of appellant's fraud claim is the draft of a letter, dated July 7, 1997, prepared by architect Jorge Ortiz Colón for signature by PRIC's director at the time, Dr. Luis E. Díaz Hernández. It is undisputed that the letter, communicating denial of the Institute's endorsement of a tax exemption, was never sent, and that appellant was actually notified of the denial in September 1997 by another PRIC official.[4] It is also undisputed that Díaz Hernández had no contemporaneous knowledge of the draft letter. Appellant claims, however, that the letter was relied upon in a report written by PRIC architect Mildred González Valentín and that González Valentín testified at the PRIC administrative hearing that she had a signed copy of the letter. Appellant suggests that use of the letter, without its purported author's knowledge, was fraudulent and that the letter tilted the proceedings against him.

We are unable to discern the fraud in these allegations. There is nothing in the record to indicate that anyone deliberately misrepresented the draft letter as the actual decision of Díaz Hernández. Although it is alleged that González Valentín relied on the letter in her report (which apparently is not part of the record on appeal), this assertion is of limited significance for two reasons. First, the letter simply summarizes the results of PRIC's internal evaluation of the exemption request, matters that were directly considered at the administrative hearing and by the court on review. Nothing in the record indicates that the result at either stage was affected by the "opinion" on those matters of Díaz Hernández—who was no longer PRIC's director at the time the endorsement was denied. Second, the record indicates that González Valentín concluded in her report that, despite the problems she

4. The record indicates the notification letter was sent by Héctor F. Santiago Cazull, then Assistant Director of the Institute's Patrimony Conservation area.

identified through an examination of the building and relevant documents, a five-year tax exemption would be appropriate if the construction blueprints for the project had previously received official approval, which would indicate compliance with PRIC's requirements for preserving the building's historical value. In other words, despite the presence of the draft letter in her report, González Valentín recommended an exemption if PRIC's evaluation showed that the project met historical standards.

Thus, rather than reflecting fraud because it included the draft letter, the architect's report suggests that the exemption was denied because the project did not fulfill the specified requirements—which was the conclusion reached in both the administrative and judicial proceedings.[5] We thus find no basis for assigning the letter any significance in PRIC's decision to deny endorsement, and certainly no indication that it was fraudulently used to induce an unjustified result.

In support of his claims, appellant submitted sworn statements from Díaz Hernández, the PRIC director who was the nominal author of the July 7 letter, and three others. Although several of the statements make conclusory reference to fraudulent activity, including forged documents, fraudulent documents and "other improprieties," the only specific assertions of wrongdoing appear to refer to the Ortiz Colón draft letter or the

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5. Although appellant asserts that González Valentín testified that she had a signed copy of the Díaz Hernández letter, there is some ambiguity in the record about the certainty of that statement. The lack of clarity is of no consequence, however, because the record contains no other evidence that any copy of the letter, which unquestionably was a draft, was signed. The only reasonable inference to be drawn, therefore, is that González Valentín's testimony, if accurately described, reflected an error on her part and is not evidence of fraud.

González Valentín report, which, as we have discussed, cannot support a fraud claim. As the following descriptions reveal, the offered sworn statements fail to assist appellant in meeting his obligation under Fed.R.Civ.P. 9(b) to allege his claim of fraud "with particularity." *See United States v. Karvelas*, 360 F.3d 220, 226 (1st Cir.2004) ("Rule 9(b) requires that a plaintiff's averments of fraud specify the time, place, and content of the alleged false or fraudulent representations.").

In his statement, Díaz Hernández, who left his position before the endorsement was denied, confirms that he did not write the July 7 letter, criticizes its inclusion in the architect's report and refers to "apparent inconsistencies effectuated by officials at the Culture Institute." He states that he would have granted a ten-year tax exemption because the project had complied with all of PRIC's requirements, but his general declaration of compliance contradicts the agency's and court's formal findings that the requirements were not fulfilled. None of his assertions casts doubt on the integrity of the review process conducted by the Puerto Rico circuit court or provides a basis for devaluing the finality of its judgment.

Each of the other three affiants, all of whom worked for PRIC, also offered only conclusory assertions of wrongdoing. Luis A. Ruiz Quirindongo, an advisor to another PRIC director, Dr. José Ramón de la Torre Martínez, stated that the file on appellant's project showed that "documents had been concealed, and that possible crimes committed therein, which induced errors within the examiner's official report, as well as the courts and officials of the Culture Institute." Ruiz stated that documentation was forged, but did not specify the documents. He further stated that PRIC's auditor concluded that there had been "an agreement . . . to

commit and to cover up crimes" related to appellant's project. Such a bald claim of fraud, left unsubstantiated with any particular misconduct, is insufficient to satisfy Rule 9(b) or to justify re-opening the administrative process.

The remaining two affidavits were similarly lacking in particularity. De la Torre, who had left his position at PRIC by the time of his statement, reported that he "became aware of certain questionable details executed during the process of denial of [appellant's] tax exemption application." He asserted that architect Ortiz Colón "apparently induced the Institute and the Courts to err, by creating the false impression" that Ortiz Colón's written endorsement was for a limited portion of the project, the tunnel protection plan. The Puerto Rico court, however, directly reviewed the file materials and concluded otherwise.[6]

The final affidavit was from Edgar Correa Salgado, PRIC's Press and Communication Director under de la Torre. Correa refers to "the existence of certain fraudulent documents prepared by Architect Jorge Ortíz Colón" and his—Correa's—recommendation that an internal investigation be conducted into appellant's allegations of improprieties in the endorsement process. Again, there is no identification of particular "fraudulent documents," other than, apparently, the draft letter. According to Correa, when he confronted de la Torre with information regarding "other improprieties and internal security problems" affecting PRIC, de la Torre informed him that

6. The court's opinion stated that "it is clearly evident from the file—in particular from the documentary evidence provided by the petitioner himself—that said endorsement was given for the blueprints that submitted 'the corrective[ ] measures taken in order to separate (sic) the affected parts of the tunnel', . . . and that the same did not amount to or constitute an endorsement for the project to be carried out in the building."

he was proceeding with his immediate resignation and "that he would not carry out any action in relation to [appellant's] case."

None of these statements contain factual allegations adequate to undergird appellant's conclusory fraud claim. Even with respect to the July 7 draft letter and the González Valentín report, the statements aver no fraudulent link to the administrative and judicial evaluation process. If such generalities were enough to justify renewed inquiry into PRIC's denial of the endorsement, the finality of judgments would be seriously compromised. Lacking a viable fraud claim, appellant may not escape the preclusive effects of the prior proceedings. Moreover, his inability to adequately allege fraud defeats any RICO claim, which depends upon a showing of at least two predicate acts of "racketeering activity," conduct that in this case was alleged to be mail and wire fraud. *See North Bridge Assocs., Inc. v. Boldt*, 274 F.3d 38, 42 (1st Cir.2001). Finally, to the extent appellant asserts a section 1983 claim based on conduct unrelated to the revocation of the tax exemption, *see* note 2 *supra*, it is insufficiently elaborated in his brief to permit meaningful review and is therefore waived. We thus affirm the district court's judgment of dismissal.[7]

Affirmed.

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7. We have considered appellant's challenges to CRIM's submission of exhibits without translations and to the court's allowance of extra filings by defendants, but find no error warranting reversal of the district court's judgment.

APPENDIX B – OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO FILED AUGUST 13, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 01-2325 (JAG)

LIONEL LUGO RODRIGUEZ, *et al.*,

Plaintiffs,

v.

PUERTO RICO INSTITUTE OF CULTURE, *et al.*,

Defendants.

OPINION AND ORDER

GARCIA-GREGORY, District Judge.*

This is an action brought by plaintiffs, Dr. Lionel Lugo Rodriguez ("Lugo") ARPO, S.E., d/b/a Plaza Suroeste Mall ("Mall"), Plaza Oasis & Hotel Oasis Inc., Southwest Investment Corporation and Inn Management (collectively, "plaintiffs") against Federal Insurance Company ("Federal Insurance"), Puerto Rico Institute of Culture ("PRIC"), Robert L. Bounds Dávila, Jorge Ortiz Colón, Doris Maza, Héctor Cazul, Mildred González Valentín, Collection Center for Municipal Income ("CRIM"), Ramón Nazario, Carlos Martínez, Manuel Velázquez, Orlando Mas, Orlando Hernández, and Osvaldo González Aviles, all sued in their individual and official capacities (collectively, "defendants"). The verified

* Mario Arroyo, a third year student at Tulane Law School, assisted in the research and preparation of this opinion.

complaint asserts four causes of action against the defendants. (1) a civil claim for damages under the Organized Crime and Control Act of 1970, Pub.L. No 91-452, Section 901(a), 84 Stat. 941, Racketeering Influenced and Corrupt Organization ("RICO"); (2) a claim for violation of plaintiffs civil rights under 42 U.S.C. § 1983, 1985 and 1986 premised under certain acts and omissions of defendants under color of state law; (3) a tort claim pursuant to Article 1802 of the Puerto Rico Civil Code ("the Code"); and (4) a claim for vicarious liability under Article 1803 of the Code. Currently pending before the Court are defendants' motion to dismiss and for summary judgment (Docket Nos. 15, 39, 65, and 87).[1] The Court will grant these motions for the reasons set forth below.[2]

FACTUAL BACKGROUND

The facts that originate this case began in 1987 when Lugo purchased some real estate consisting of a lot and a building in San Germán. Lugo wanted to develop a

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1. CRIM filed a motion to dismiss. (Docket No. 15). PRIC filed a motion to dismiss and for summary judgment. (Docket No. 39). Federal Insurance moved to join PRIC's motion to dismiss and summary judgment and filed a motion for partial summary judgment (Docket Nos. 55 and 65.), which has been recently opposed by the plaintiffs and the PRIC. (Docket Nos. 102 and 104.) Individual co-defendants Robert L. Bounds Dávila, Jorge Ortiz Colón, Doris Maza, Mildred González Valentín, Ramón Nazario, Carlos Martínez, Orlando Mas, and Orlando Hernández filed a motion to join PRIC's motion to dismiss. (Docket No. 87). Individual co-defendants Héctor Cazul, Manuel Velázquez, and Orlando González Aviles have not responded to the plaintiffs' claims.

2. The Court finds it unnecessary to decide Federal Insurance's motion for partial summary judgment based on the absence of insurance coverage in view of its decision on PRIC's motion to dismiss and/or for summary judgment which was joined by Federal Insurance. This joinder results in Federal Insurance's dismissal from the suit together with PRIC, and to that extent moots Federal Insurance's request for partial relief based on lack of insurance coverage.

commercial project in the lot and building. On January 21, 1988 Lugo applied for the required permits and submitted a preliminary construction plan for a Mall to the Puerto Rico Administration of Regulations and Permits ("ARPE"). On July 20, 1988, ARPE responded with a "Notice of objection" pursuant to which Lugo had to submit an endorsement from PRIC for the proposed construction because of certain historical tunnels that could be affected by the construction. Lugo then submitted the preliminary Mall construction plans to PRIC.

PRIC informed Lugo that it would approve the preliminary construction plans only if certain recommendations it was making regarding the three façades of the building existing in the property were incorporated to the final construction plans, in addition to the preservation of the historical tunnels. (Docket No. 39 at 3). Lugo submitted the letter from the PRIC to ARPE for its consideration. ARPE construed the letter as an authorization of PRIC for the proposed preliminary construction plans and conditionally approved them. ARPE stated that the endorsement of PRIC was conditioned on the inclusion of the recommendations regarding the façades in the final construction plans. (Docket No. 39 at 3).

On February 16, 1989, architect López Reyes, representing PRIC, made several observations to Lugo regarding the amended construction plans submitted by Lugo, as well as the initial PRIC recommendations respecting the preliminary construction plans, and requested that these observations be incorporated as soon as possible. (Docket No. 39 at 3). In response, Lugo, through architect Héctor L. Torres of Archicorps (a consulting firm hired by Lugo) sent a letter to PRIC, informing that ARPE was requiring its endorsement for the project. In the letter, Lugo stated that only one of the

three façades of the original building would not be modified. He also indicated that since so little of the building remained on the lot, the structure to be built would be made out of steel and the characteristics of the architecture and the new amended plans would incorporate elements that would be more adequate to the operation of a shopping center. (Docket No. 39 at 4). Ortiz Colón, a PRIC architect, informed Lugo that the project would only be acceptable if all the existing building façades were to be preserved in their current state.

On October 19, 1989, Lugo and ARPE reached an agreement whereby the permits would be granted if the project complied with PRIC's façade recommendations. In response to the agreement with ARPE, PRIC informed that Lugo's supposed "PRIC endorsement" submitted to ARPE was not official since it had not been signed by an authorized officer. Hence, PRIC had not officially endorsed the project.

On September 10, 1991, Lugo sent a letter requesting PRIC's endorsement for the project's tax exemption. PRIC denied the application for endorsement. The final decision as to whether a potential tax payer is entitled to a tax exemption once it has PRIC's endorsement lies exclusively on the Secretary of the Treasury. PRIC's intervention is limited to one of endorsement. (Docket No. 39 at 9.) Since Lugo was not pleased with the decision, he requested the PRIC's Board of Directors to review the decision. After receiving documentary evidence and oral testimony, an official examiner recommended that the application for PRIC's endorsement for tax exemption be denied. (Docket No. 39 at 6.) The Board of Directors adopted said report and denied the application.[3]

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3. Plaintiff does not specify on which date the Board of Directors adopted said report.

Thereafter, Lugo sought review in the Puerto Rico Circuit Court of Appeals. The Puerto Rico Circuit Court of Appeals addressed Lugo's allegations that PRIC had endorsed construction of the Mall and that PRIC officials had made false reports in his application. On December 9, 1998, the Court held that it was clear that the endorsement for the construction was limited to certain corrective measures related to the tunnel running underneath the Mall and that said endorsement did not approve the work to be performed in the building. (Docket No. 39 at 11.) It expressly held that it was obvious that the Mall project had never obtained PRIC's official endorsement, and that during its development Lugo never seriously considered framing the Mall according to the best principles of historical preservation. (Docket No. 39 at 12). It also held that Lugo had expressed in two occasions that he was not applying for a tax exemption and that he was now estopped by his own acts in pursuing such application inasmuch as he had waived it. In its conclusion, the Court expressed that Lugo did not establish that there were any irregularities in the PRIC administrative and final decision denying his application for the tax exemption that would justify reversal.

On January 14, 1999, the plaintiff filed a petition for certiorari before the Puerto Rico Supreme Court seeking review of the Court of Appeals decision. The Supreme Court denied certiorari on March 5, 1999.

On July 10, 2001, the plaintiff filed suit in the Mayaguez Court of First Instance alleging that PRIC had filed a false and fraudulent report which had caused the denial of the requested tax exemption. On March 12, 2002 The Mayaguez Court of First Instance granted defendants' motion for summary judgment on *res judicata* grounds and entered judgment against the plaintiffs' action with prejudice. Meanwhile, on October 2, 2001, plaintiffs had

filed in this Court the present complaint against PRIC and the other co-defendants. Simultaneously with the filing of the Complaint, plaintiffs filed a request for a temporary restraining order, which was denied. (Docket No. 4.)

DISCUSSION

A. *Motion to Dismiss Standard*

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may not be dismissed unless it appears beyond doubt that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *See Brown v. Hot, Sexy, and Safer Prods., Inc.*, 68 F.3d 525, 530 (1st Cir.1995). The Court accepts all well-pleaded factual allegations as true, and draws all reasonable inferences in plaintiff's favor. *See Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 51 (1st Cir.1990). The Court need not credit, however, "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like" when evaluating the Complaint's allegations. *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir.1996). When opposing a Rule 12(b)(6) motion, "a plaintiff cannot expect a trial court to do his homework for him." *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 22 (1st Cir.1991). Plaintiff is responsible for putting her best foot forward in an effort to present a legal theory that will support her claim. *Id.*, at 23 (*citing Correa-Martinez*, 903 F.2d at 52). Plaintiff must set forth "factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable theory." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir.1988).

Appendix B

B. *Summary Judgment Standard*

The court's discretion to grant summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) sets forth the standard for ruling on summary judgment motions: The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. F.R.C.P. 56(c). The critical question is whether a genuine issue of material fact exists. A genuine issue exists if there is sufficient evidence supporting the claimed factual dispute to require a choice between the parties' differing versions of the truth at trial. *Morris v. Government Dev. Bank of Puerto Rico*, 27 F.3d 746, 748 (1st Cir.1994); *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 841 (1st Cir.1993). A fact is material if it might affect the outcome of the suit under the governing law. *Morrissey v. Boston Five Cents Sav. Bank*, 54 F.3d 27, 31 (1st Cir.1995).

In order to assist the court in the daunting task of searching for genuine issues of material fact in the record, this district adopted Local Rule 311.12. *See Corrada Betances v. Sea-Land Service, Inc.*, 248 F.3d 40, 43- 44 (1st Cir.2001). This rule, requires, in relevant part, that a party moving for summary judgment submit, in support of the motion, "a separate, short concise statement of material facts as to which the moving party contends there is no genuine issue to be tried and the basis of such contention as to each material fact, properly supported by specific reference to the record." D.P.R.R. 311.12. In turn, the rule requires the party opposing a summary judgment motion, here Lugo, to submit a "separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried, properly supported by specific references to the record." D.P.R.R. 311.12. It is clearly

established in this District that compliance with Local Rule 311.12 is critical, given that the Court will only consider the facts alleged in the aforementioned 311.12 statements when entertaining the movant's arguments. *See Rivera de Torres v. Telefónica de Puerto Rico,* 913 F.Supp. 81 (D.P.R.1995). Defendants, PRIC and Federal Insurance, filed the requisite 311.12 statement with appropriate references to the record. Defendants seek to support all the facts contained in their 311.12 statement with the findings of fact and conclusions of law made in the state court proceedings.

Plaintiffs opposed PRIC's summary judgment motion and recently opposed Federal Insurance's summary judgment motion. Plaintiffs, however, have failed to comply with the so-called "anti-ferret rule," as they have not presented a concise statement of material facts as to which there is a genuine issue to be tried. The Court is not required to "ferret through the record" lurking for facts that may favor the plaintiffs when those facts were not proffered under a counter-designation of facts as required by Local Rule 311.12. *Morales,* 246 F.3d at 33. "When a party opposing a motion for summary judgment fails to comply with the 'anti-ferret rule' the statement of material facts filed by the party seeking summary judgment shall be deemed . . . admitted." *Mendez Marrero v. Toledo,* 968 F.Supp. 27, 34 (D.P.R.1997); *Tavarez v. Champion Prods., Inc.,* 903 F.Supp. 268, 270 (D.P.R.1995).

Here the plaintiffs took the risk "to sit idly by and allow the summary judgment proponent to configure the record." *Kelly v. United States,* 924 F.2d 355, 358 (1st Cir.1991). Although the nonmovant's failure to provide a statement of contested material facts does not automatically warrant the granting of summary judgment, "it launches the nonmovant's case down the road towards an easy dismissal." *Mendez Marrero,* 968 F.Supp. at 34.

Appendix B

Since all material facts in the PRIC's and Federal Insurance's statements of uncontested material facts are deemed admitted, the Court need only examine whether, given the uncontested facts, PRIC and Federal Insurance are entitled to judgment as a matter of law.

I. *Res Judicata*

Defendants argue that Lugo is barred from prosecuting this action by the doctrine of *res judicata*, as incorporated in 28 U.S.C. § 1738.[4] Plaintiffs on the other hand sustain that the application of the *res judicata* defense is inapplicable to this case. They claim that the plaintiffs are different, that the cause of action under RICO is not the same and that this case falls under the fraud exception to the rule of *res judicata*. The Court disagrees.

"The doctrine of *res judicata*—meaning literally that the thing has been decided—binds the parties from litigating or re-litigating any issue or claim that was adjudicated in a prior case." *Suarez-Cestero v. Pagan-Rosa*, 2002 WL 824122 at 9 (D.P.R. March 11, 2002). *Res judicata* (also known as, "claim preclusion"), forecloses litigation of all matters that have been decided in an earlier case, while the rule of collateral estoppel (also known as, "issue preclusion"), precludes re-litigation of issues actually adjudicated in an earlier proceeding. *Id.* (*citing* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction*, §§ 4404 and 4402 (1982)).

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4. 28 U.S.C. § 1738 provides in pertinent part as follows: "The records and judicial proceedings of any court of any . . . State, Territory or Possession [of the United States], or copies thereof, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Appendix B

Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgment emerged. *Kremer v. Chemical Construction Corporation,* 456 U.S. 461, 466, S.Ct 1883 (1982). Thus the question of the preclusive effect of a judgment issued by a Puerto Rico state court depends on Puerto Rico law. *See, Migra v. Warren City School District Board of Education,* 465 U.S. 75 (1984).

In Puerto Rico, judgments can be given preclusive effect only if they are final and on the merits. *See Millán v. Caribe Motors Corp.,* 83 P.R. Dec. 474 (1961); *Stitzer v. University of Puerto Rico,* 617 F.Supp. 1246, 1254 (D.P.R.1985).

Under Puerto Rico law, the party asserting claim preclusion or *res judicata* must establish: (a) the existence of a prior judgment on the merits which is "final and unappealable", (b) the perfect identity of the thing or cause, and (c) the perfect identity of the parties and the capacity in which they acted. *Boateng v. InterAmerican University, Inc.,* 210 F.3d 56 (1st Cir.2000). Defendants allege that all these factors are present in the case and that consequently *res judicata* forecloses this litigation.

a. ***Prior judgment on the merits which is "final and unappealable"***

The Puerto Rico Supreme Court has repeatedly stated that in order to be given *res judicata* effect, a judgment must be "final and unappealable." *Rivera v. Insurance Co. of Puerto Rico,* 103 P.R. Dec. 91 (1974); *Sucesión De Pablo Zayas Berríos v. Berrios,* 90 P.R. R. 551 (1964). The denial of certiorari by the Puerto Rico Supreme Court is a final and unappealable judgment against Lugo. Therefore the requisite for finality is present for the application of preclusion.

b. ***Identity of thing or cause.***

It is evident, from the Puerto Rico Circuit Court of Appeals decision, that the cause, facts and claims upon which the plaintiffs based their complaint in the State court are, in fact, the same as the cause and claims stated in the case before this Court. In *Lausell Marxuach v. Díaz de Yañez,* 103 P.R. Dec. 533 (1975), "cause" is defined as "the principal ground, the origin of the actions or exceptions raised and decided, and it must not be mistaken for the means of proof nor for the legal grounds of the claims adduced by the parties", while "thing" is termed "the object or matter over which the action is exercised."

The requirement of identity of causes does not prevent the *res judicata* doctrine from being applied to a second case simply because the plaintiff alleges a new legal theory in the new case. *Futura Development v. Centex Corp.,* 761 F.2d 33, 44 (1st. Cir.1985). Lugo's cause and thing in the state litigation centered on the tax exemption. The cause and thing in the instant action is the *same* tax exemption. While the previous State Court action and the present action may be premised upon different legal theories, they both arose from the same set of facts— denial by PRIC of Lugo's request for tax exemption. It was because of the denial of such exemption that plaintiffs claim that PRIC and the other co-defendants allegedly violated their rights. Thus, the Court fails to see how Lugo can characterize both causes of action as different, when they did, in fact, arise from the tax exemption controversy itself. Therefore, the required identity of object and cause between the State Court judgment and the present suit is present for *res judicata* purposes.

c. ***Identity of parties***

Plaintiffs point out that the present action contains new parties that were not parties in the State Court action. Nevertheless, the defense of *res judicata* is applied even when the named parties are different, as long as the real parties in interest are identical. *See, Arecibo Radio Corporation v. Commonwealth,* 825 F.2d 589, 591 (1st Cir.1987). Lugo, the owner of the Mall, was the applicant for endorsement by the PRIC of the project. In an attempt to circumvent the doctrine of *res judicata,* Lugo has added as co-plaintiffs; ARPO, S.E., d/b/a "Plaza Suroeste Mall", Plaza Oasis & Hotel Oasis Inc., Southwest Investment Corporation and Inn Management. Since he is the owner of these corporations, there is no doubt that the real party in interest is Lugo.

The plaintiffs have also included as co-defendants PRIC employees; Robert L. Bounds Dávila, Jorge Ortiz Colón, Doris Maza, Héctor Cazul and Mildred González Valentín and CRIM; Ramón Nazario, Carlos Martínez, Manuel Velázquez, Orlando Mas, Orlando Hernández, and Osvaldo González Aviles. This is also an attempt to circumvent the *res judicata* doctrine inasmuch as the PRIC is the real party in interest since it acts through its officials and employees. As a result, the Court concludes that all parties are the same for *res judicata* purposes except Federal Insurance, which as insurer of the PRIC is entitled to assert such a defense in this case.

d. ***Public Policy—Fraud***

The Complaint alleges that several defendants from PRIC participated in a conspiracy by providing fraudulent testimony and/or altering files and records from plaintiff's building's records. Because of this alleged fraud, plaintiffs argue that *res judicata* should not be applied in this case.

Appendix B

In rare occasions where there is a great public interest at stake, the Supreme Court of Puerto Rico has allowed certain exceptions to the *res judicata* doctrine. *Bonafont Solis v. American Eagle,* 1997 WL 423416, 28-29, (97 JTS 86, June 5, 1997). Under Puerto Rico law, *res judicata* will not be applicable when (1) a judgment was entered pursuant to an invalid acceptance by the defendant of the claim; (2) the court entering the judgment lacked jurisdiction to do so; (3) an attempt to appeal failed through no fault of the plaintiff; or (4) there was fraud. *Medina v. Chase Manhattan Bank,* 737 F.2d 140, 142-143 (1st Cir.1984)

Regarding the allegation of the alleged "conspiracy to commit fraud" for denial of PRIC's endorsement, the State Court held that PRIC acted properly because the denial was based on the plaintiff's failure to comply with PRIC's requirements. The sworn statements on which plaintiff's allegations rely contain numerous suppositions and statements regarding PRIC's endorsements of the Project. The subject matter of these statements has been previously presented in the State Court action.

The Puerto Rico Court of Appeals action decided the issue of PRIC's alleged fraud concerning Lugo's tax exemption request. Lugo could have submitted the sworn statements attached to the complaint during the initial administrative proceedings if he had adequately prepared for the same. Plaintiffs had the opportunity to fully litigate their claims both at an administrative level and before the Puerto Rico Circuit Court of Appeals on the fraud allegations presently before this Court. They cannot now pretend to relitigate these issues and have a second bite at the apple.

Several federal appellate courts have applied the doctrine of claim preclusion to cases in which plaintiffs in an earlier state court proceeding have failed to bring their

fraud claims invoking RICO. In *Kaufman v. BDO Seidman,* 984 F.2d 182 (6th Cir.1993), the Sixth Court applied the preclusion doctrine where plaintiffs had previously and unsuccessfully prosecuted a malpractice claim against their financial adviser. The Court held that plaintiff's RICO claims were precluded because the factual issues of causation in the two actions were sufficiently similar to bar subsequent prosecution of a RICO claim in federal court against the same defendants.[5] Accordingly, Lugo is estopped under the doctrine of res judicata from bringing another action on the same grounds. Therefore, the plaintiffs's claims against PRIC; Robert L. Bounds Dávila, Jorge Ortiz Colón, Doris Maza, Mildred González Valentín, and CRIM; Ramón Nazario, Carlos Martínez, Orlando Mas, and Orlando Hernández in both their personal and official capacities must be dismissed.

II. *The Sufficiency of the RICO Claims*

Even if the *res judicata* doctrine were not to apply, however, the Court finds that plaintiffs have failed to adequately plead a RICO claim. To substantiate the RICO claim, plaintiffs allege that defendants executed a racketeering scheme to defraud them and subsequently engaged in mail fraud and wire fraud *inter alia.*

The First Circuit has described the standard for a motion to dismiss in a civil RICO case as follows: The complaint must be anchored in a bed of facts, not allowed to float freely on a sea of bombast. In other words, a court

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5. Similarly, in *Evans v. Dale,* 896 F.2d 975 (5th Cir.1990), the Court held that the doctrine of *res judicata* barred plaintiffs' RICO claim, because the claims of the parties had been the subject of a previous state court proceeding. The Court also found that the plaintiff's wife could have brought her RICO claim in the earlier proceeding and her failure to do so was fatal to her subsequent effort to bring such a claim in federal court. *citing, Dibbs v. Gonsalves,* 921 F.Supp. 44, 49-50 (D.P.R.1996).

assessing a claim's sufficiency has no obligation to take matters on blind faith; it need not credit bald assertions, unsubstantiated conclusions, or outright vituperation. *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir.1991). Hence, to avert dismissal a civil RICO complaint must, at a bare minimum, state facts sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute and (ii) a causal nexus between that activity and the harm alleged.

Also, in order to recover under RICO, a plaintiff must prove that the defendant engaged in "prohibited activities" consisting of predicate acts which constitute a "pattern of racketeering activities" 18 U.S.C. §§ 1961-1968.

The Court has reviewed plaintiff's bald assertions and unsubstantiated conclusions, and concludes that the alleged criminal acts by the defendants do not have the same or similar purposes, results, participants, victims or methods. Plaintiffs' allegations that the defendants have acted fraudulently by acting, and conspiring to act, in a manner designed to deny them their property rights are conclusory and devoid of minimal facts substantiating them. Plaintiffs's claims and testimony generally allege no more than that the defendants "acted in racketeering activities to defraud the plaintiff". Inasmuch as plaintiffs have failed to meet the pleading requirements for a RICO complaint to survive, their RICO claims against PRIC, CRIM, Robert L. Bounds Dávila, Jorge Ortiz Colón, Doris Maza, Mildred González Valentín, Ramón Nazario, Carlos Martínez, Orlando Mas and Orlando Hernández must be dismissed.[6]

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6. Co-defendants Héctor Cazul, Manuel Velázquez, and Orlando González Aviles have not opposed the claim against them. Therefore the RICO claim against them may proceed.

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III. The Butler Act

It should be noted that plaintiffs seek to prevent further enforcement of the collection of taxes imposed by CRIM and also request monetary relief for the "fraudulent" tax assessments as a remedy. The Court finds that plaintiffs' requests are barred by the Butler Act.

The Butler Act prohibits suits in federal Court for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico. See, 48 U.S.C. § 872. The jurisdictional bar set forth by the Butler Act is not absolute. It does not apply to cases where the State courts lack a plain, speedy and efficient remedy. Secilec Intern., Ltd. v. Secretary of the Treasury, 525 F.Supp. 980, 981 (D.P.R.1981).

In this case the procedure afforded by the State legislature is plain, speedy and efficient. Plaintiffs prosecuted their claims and participated in several administrative and Court proceedings in which they had ample opportunity to vindicate their claims. These proceedings comply with the minimal procedural criteria required for this type of remedy.

Although plaintiffs may be dissatisfied with the state administrative and judicial procedure as a whole, they have not identified significant procedural flaws that render it inappropriate or corrupt. The remedy established by the PRIC complies with minimum procedural requirements imposed by the Supreme Court. It is clear that plaintiffs had their day in Court for purposes of the Butler Act and may not now seek to enjoin the collection of taxes imposed by the laws of Puerto Rico in this Court. Plaintiffs's claim against CRIM must be dismissed for lack of subject matter jurisdiction.

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IV. *Plaintiffs' 42 U.S.C. § 1983 Claims Against Named Defendants in their official and personal capacities*

Plaintiffs also allege that PRIC's actions constitute a violation to 42 U.S.C. § 1983 and seek damages. This type of remedy is also barred by the Eleventh Amendment. *See Acevedo López v. Police Dept. of the Commonwealth of P.R.*, 247 F.3d 26, 28 (1st Cir.2001). It is well established that the Eleventh Amendment bars a § 1983 action against a State, State Agency, or any State Official in his official capacity for monetary damages that would have to be paid from the state treasury. *See Wang v. New Hampshire Board of Registration in Medicine*, 55 F.3d 698, 700 (1st Cir.1995). Accordingly, plaintiffs's § 1983 claim against Robert L. Bounds Davila, Jorge Ortiz Colón, Doris Maza, Mildred González Valentín, Ramón Nazario, Carlos Martínez, Orlando Mas, Orlando Hernández, Héctor Cazul, Manuel Velázquez, and Orlando González Aviles in their official capacities must be dismissed.

Plaintiffs also seek relief under § 1983 against the above co-defendants in their personal capacities.[7] It is well settled that in order for a claim to be cognizable under section 1983, plaintiffs must plead and prove three elements: (1) that the defendants acted under color of state law; (2) that plaintiffs were deprived of federally protected rights, privileges, or immunities; and (3) that the defendants's alleged conduct was causally connected to the plaintiffs' deprivation. *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 558 (1st Cir.1989). Hence, to succeed in a § 1983 action, plaintiffs must prove that defendants actions were a cause in fact or a proximate cause of plaintiffs' injury. *See Collins v. City Harker Heights*, 503 U.S. 115 (1992).

7. § 1983 expressly embraces actions to redress deprivations, under color of state law, of . . . rights, privileges, or immunities secured by the Constitution. *Pontarelli v. Stone*, 930 F.2d 104, 114 (1st Cir.1991).

Plaintiffs have proven the first element. The defendants were clearly acting under color of state law. Lugo, however, has failed to establish that he was deprived of a federally protected right, privilege, or immunity. Just because the defendants denied Lugo's application for the endorsement of his project does not mean that he was deprived of his property rights. There are also no convincing facts indicating that the defendants' conduct was causally connected to the plaintiffs' deprivation. The Court, after engaging in a liberal reading of the Complaint, analyzing the alleged facts and indulging all reasonable inferences in favor of plaintiffs, finds that plaintiffs have not pled sufficient facts to establish a claim under § 1983. Plaintiffs' § 1983 claim against co-defendants Robert L. Bounds Dávila, Jorge Ortiz Colón, Doris Maza, Mildred González Valentín, Ramón Nazario, Carlos Martínez, Orlando Mas, and Orlando Hernández in their personal capacities must be dismissed.[8]

V. *Supplemental State Claims*

Since no federal claims remain, the court will dismiss all supplemental state claims without prejudice pursuant to 28 U.S.C. § 1367(c)(3), except as to the defendants Héctor Cazul, Manuel Velázquez, and Orlando González Aviles given their failure to oppose plaintiffs' federal claims.

CONCLUSION

In view of the foregoing reasons, Defendants motions to dismiss and for summary judgment (Docket No. 15,39, 65 and 87) are hereby GRANTED. Plaintiffs's RICO claims against CRIM, PRIC, Robert L. Bounds Dávila, Jorge Ortiz

8. Héctor Cazul, Manuel Velázquez, and Orlando González Aviles have not opposed the 1983 claims. Therefore the claims against them may proceed.

Colón, Doris Maza, Mildred González Valentín, Ramón Nazario, Carlos Martínez, Orlando Mas, and Orlando Hernández both in their personal and official capacities are hereby DISMISSED. Plaintiffs' claims against CRIM, PRIC, Robert L. Bounds Dávila, Jorge Ortiz Colón, Doris Maza, Mildred González Valentín, Ramón Nazario, Carlos Martínez, Orlando Mas, and Orlando Hernández under § 1983 are also dismissed. Federal Insurance's motion to join PRIC's motion for summary judgment is granted and all claims against Federal Insurance are dismissed. The supplemental law claims against these defendants are dismissed without prejudice, pursuant to 28 U.S.C. § 1367. Plaintiffs' federal and supplemental claims against co-defendants Hector Cruz, Manuel Velázquez, and Orlando González Avilés remain. The Court, however, sees no reason why these claims should not be equally dismissed for the same reasons that the claims against the other co-defendants have been dismissed. Accordingly, the Court orders plaintiffs to show cause on or before August 23, 2002, why the claims against the remaining co-defendants should not be dismissed.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 9th day of August, 2002.

APPENDIX C – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 1, 2004

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 02-2305

LIONEL LUGO RODRIGUEZ, ET AL.,

Plaintiffs, Appellants,

v.

PUERTO RICO INSTITUTE OF CULTURE, ET AL.,

Defendants, Appellees.

Order entered by Chief Judge Michael Boudin, Senior Judge Frank M. Coffin, Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, Judge Jeffrey R. Howard. The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.